Supreme Court, U.S.
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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

CAROL B. HUBBARD - - - - - *Petitioner*

versus

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD - - - - *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

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PETITION FOR WRIT OF CERTIORARI

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March 20, 1997

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38 pp

QUESTION PRESENTED FOR REVIEW

Whether the Kentucky Education Professional Standards Board may not, consistent with due process, revoke a school teacher's teaching certificate, thereby extinguishing her professional teaching career and livelihood, without presenting any evidence whatsoever that the teacher's "off-duty" conduct impaired her ability to function as a teacher, and where the only evidence presented as to fitness supported her fitness to teach.

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OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky, rendered September 20, 1996, is not published. This opinion is set forth in this Appendix at 1a.

The judgment of the Franklin Circuit Court, entered on July 25, 1995, is set forth in this Appendix at 11a.

The final order of the Kentucky Education Professional Standards Board, entered on March 21, 1995, is set forth in this Appendix at 15a.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals of Kentucky was rendered on September 20, 1996. [1a] A timely petition for rehearing was denied by order entered on November 15, 1996. [16a] A timely motion for discretionary review by the Supreme Court of Kentucky was denied on January 22, 1997. [10a] This Court has jurisdiction to review the judgment of the Court of Appeals of Kentucky pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Kentucky Revised Statute 161.120(1)(a)

> Any certificate issued under KRS 161.010 to 161.100 . . . may be revoked by the Education Professional Standards Board for . . . immorality. . . .

STATEMENT OF THE CASE

Petitioner Carol B. Hubbard has held a Kentucky teaching certificate from 1966 to the present. She has served as a teacher in Kentucky schools from 1966 to the present, with the exception of a period of time when she resided in Washington, D.C., from 1984 until 1993. In 1992, she unsuccessfully ran for Congress in Kentucky's Fifth Congressional District. In 1993, she returned to her teaching career in Kentucky.

In 1994, she was accused of a federal misdemeanor, aiding and abetting in the wrongful use of federal employees, in connection with her unsuccessful 1992 campaign for Congress, and on March 28, 1994, she settled the misdemeanor charge by plea bargain. The Honorable Louis F. Oberdorfer, United States District Judge, observed:

> I am satisfied that you're a victim and not a perpetrator and I'm satisfied that you're thoroughly remorseful. [Stipulation by Petitioner and the Board, 17a]

Her contract to teach school was subsequently renewed for school years 1994-1996.

Nevertheless, on October 24, 1994, the Kentucky Education Professional Standards Board ("Board") issued a statement of charges accusing petitioner of: 1) willful and knowing violation of school laws and regulations; 2) immorality; and 3) misconduct in office. The first and third charges were subsequently dismissed.

Only the "immorality" charge remained, based on Kentucky Revised Statute 161.120(1)(a):

> Any certificate issued under KRS 161.010 to 161.100 . . . may be revoked by the Education Professional Standards Board for . . . immorality. . . .

The December 13, 1994 hearing on this charge was brief. The evidence, or lack thereof, was as follows. The Board filed, without comment, documents relating to petitioner's plea agreement on the federal misdemeanor.

> Board's Counsel: [M]y first witness and only witness is Terri Eversole. . . . And, just briefly, go through each one, and tell . . . what the document is.
>
> Ms. Eversole: Okay. Exhibit 6 is the charges against Ms. Hubbard. Exhibit 7 is the guilty plea to the charges. Exhibit 8 is the transcript of the guilty plea. Exhibit 9 is the government sentencing memorandum. Exhibit 11 is the government's response to Ms. Hubbard's sentencing memorandum. Exhibit 12 is Ms. Hubbard's response to the government's sentencing memorandum.
>
> Board's Counsel: [T]hat is basically the case — the factual case of the Board. [Transcript of Hearing, December 13, 1994, pp. 4-9, 19a-22a]

The Board presented *no evidence whatsoever* to demonstrate that petitioner's misdemeanor conduct, which occurred in a context other than her teaching profession, had any nexus to her teaching performance.

REASON FOR GRANTING THE WRIT

THE KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD MAY NOT, CONSISTENT WITH DUE PROCESS, REVOKE A SCHOOL TEACHER'S TEACHING CERTIFICATE, THEREBY EXTINGUISHING HER PROFESSIONAL TEACHING CAREER AND LIVELIHOOD, WITHOUT PRESENTING ANY EVIDENCE WHATSOEVER THAT THE TEACHER'S "OFF-DUTY" CONDUCT IMPAIRED HER ABILITY TO FUNCTION AS A TEACHER, AND WHERE THE ONLY EVIDENCE PRESENTED AS TO FITNESS SUPPORTED HER FITNESS TO TEACH.

In the education employment context, the Kentucky Court has stated the due process parameters for revocation based on conduct which occurs in a context separate from competency in the classroom.

> It was not the intention of the legislature to subject every teacher to discipline or dismissal for private shortcomings that might have come to the attention of the Board of Education but have no relation to the teacher's involvement or example to the school community. The power of the Board to discipline teachers is not based on personal moral judgments by Board members. It exists only because of the legitimate interests of the government in protecting the school community and the students from harm. *Board of Education* v. *Wood*, Ky., 717 S.W.2d 837, 840 (1986).

Even more directly, the Kentucky Court has held,

> We agree with both Perkins and the board that the status of being a felon alone does not automatically allow a state agency to deprive one of his livelihood.

Perkins v. *Stewart*, Ky.App., 799 S.W.2d 48, 51 (1990). Just as a felon cannot be deprived of his livelihood based on his status as a felon, so petitioner should not be deprived of her livelihood based on her status as a misdemeanant. Due process in Kentucky requires substantial evidence of a nexus between the conduct and professional competency in the classroom.

> [T]he conduct, when it occurs in a context other than professional competency in the classroom should have some nexus to the teacher's occupation. *Board of Education* v. *Wood, supra*, 717 S.W.2d at 840.
>
> * * *
>
> Perkins did not contest the cabinet's assertion that he had been convicted. He appealed on the basis that the convictions were not "work related." That issue is, in our opinion, the pivotal issue that should have been the focus of the hearing. *Perkins, supra*, 799 S.W.2d at 51.

In the present case, as in *Perkins*, due process required that the pivotal issue at the Board's hearing should have been whether petitioner's misdemeanor conviction was or was not work-related. Nevertheless, the Board introduced no evidence whatsoever on that pivotal issue. Further, the Kentucky Courts ignored the holdings of the cases set forth above, which reflect the established state of the law nationwide, to deny due process of law. This is the injustice which this Court is asked to correct by granting certiorari.

At the hearing, the Board and petitioner stipulated that petitioner's teaching record was excellent.

> Carol Brown Hubbard has properly and capably performed and fulfilled her duties as a teacher throughout her career at the following schools [six schools listed, for the years 1966 through 1995]. [Stipulation, 17a]

The Board and petitioner stipulated the remarks of the misdemeanor sentencing judge, United States District Judge Oberdorfer, made at sentencing on June 30, 1994.

> JUDGE OBERDORFER: [Y]ou obviously led a productive and a very useful life as a teacher and I hope that despite your present difficulties you can resume and the authorities in Kentucky will permit you to resume your teaching career, wiser for this experience. . . . [H]aving said all that I wish for you an opportunity to return to your career as a teacher and hopefully spend an useful life. [Stipulation, 17a-18a]

The Board further stipulated the admission of letters from two school principals instead of requiring their appearances. They affirmed petitioner's exemplary performance as a teacher and her fitness to teach notwithstanding the misdemeanor plea.

Federal and state cases establish principles of due process dispositive of the present issue.

"Immorality" or "immoral conduct" in an off-duty context, without more, is insufficient to justify professional discipline.

> Preliminarily, we must reject appellee's contention that once the label "immoral" is plausibly attached to an employee's off-duty conduct, our inquiry into the presence of adequate rational cause for removal is at an end. *Norton* v. *Macy*, 417 F.2d 1161, 1165 (D.C. Cir. 1969).

A statute that purported to dismiss teachers based on "Immorality" was held "unconstitutionally vague." *Burton* v. *Cascade School District*, 353 F.Supp. 254, 255 (D. Ore. 1973), affirmed 512 F.2d 850 (9th Cir. 1975), cert. denied 423 U.S. 839.

However, even an unconstitutional statute can become constitutional with a limiting construction.

> Under well-settled law, a statute may not be declared unconstitutionally vague if it is subject to a narrowing construction which will cure its constitutional ill. See *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749-50, 81 S.Ct. 1784, 1789-90, 6 L.Ed.2d 1141 (1961). *Alford* v. *Ingram*, 931 F.Supp. 768, 771 (M.D. Ala. 1996).

See, Kolender v. *Lawson*, 461 U.S. 356, 356 (1983).

The limiting construction which saves a vague "immorality" or "immoral conduct" disciplinary statute is the construction which limits "immorality" to mean "rendering a teacher unfit to teach."

> [S]imilar statutes are facially constitutional with a limiting construction. In all of these cases, the courts have interpreted the words in the statutes to imply an unfitness to teach. [Citation omitted.] [D]irect connection needed between misconduct and teacher's work. [Citation omitted.] "[I]mmoral conduct" limited to mean "rendering a teacher unfit to teach" to avoid vagueness. *Alford* v. *Ingram, supra*, 931 F.Supp. at 773.
>
> * * *
>
> [T]he Court believes that the term "immoral conduct" was intended in this context to relate to conduct which would render a teacher unfit for the performance of his duties. *Thompson* v. *Southwest School District*, 483 F.Supp. 1170, 1180 (W.D. Mo. 1980).
>
> * * *
>
> In most cases, because the statutes do not stipulate certain conduct as per se grounds for dismissal, it will be a question of fact whether the complained of acts constitute sufficient cause. . . . Sufficient cause, though not statutorily defined, has been interpreted to mean a showing of conduct which materially and substantially affects the teacher's performance. *Hoagland* v. *Mount Vernon School District*, Wash., 623 P.2d 1156, 1159 (1981).

Even *criminal* conduct which is "off-duty" must be shown by substantial evidence to adversely affect the teacher's professional competency in the classroom.

> The federal government and society in general certainly do not condone welfare fraud, but punishment for such offenses is entrusted by the Act to the criminal process so long as the offense has no work-related effects. . . . The nexus requirement is particularly strict in cases involving non-work-related misconduct. *Gloster* v. *General Services Administration*, 720 F.2d 700, 704, 703 (D.C. Cir. 1983).
>
> * * *
>
> Without an actual showing of impairment to teaching, simply labelling an instructor as a convicted felon will not justify a discharge. . . . [I]t would violate due process to discharge a teacher without showing actual impairment to performance. *Hoagland, supra*, 623 P.2d at 1159.
>
> * * *
>
> Accordingly the mere fact that the employee has committed an immoral or disgraceful act — even a criminal act — will not justify a discharge unless it can be said that there is what the courts have described as a "vital nexus" between the act and the "efficiency of the service." *Phillips* v. *Bergland*, 586 F.2d 1007, 1011 (4th Cir. 1978).

Case after case requires substantial evidence of this "vital nexus" between off-duty misconduct and the work duties of the employee to be disciplined. Where substantial evidence of this "vital nexus" is lacking, the employee will not be deprived of her livelihood.

> The peculiar feature of appellant's dismissal, however, is that it rests on none of these possible effects on the service. The NASA official who fired him, Mr. Gabarini, testified that appellant was a "competent employee" doing "very good" work. . . . [A]ppellant's

> discharge cannot be sustained. *Norton* v. *Macy*, 417 F.2d 1161, 1166, 1168 (D.C. Cir. 1969).
>
> * * *
>
> Evaluation of the evidence presented in this case and to the board of education at the hearing on December 21, 1979, convinces the Court that no evidence has yet been developed indicating that plaintiff's conduct has rendered her unfit to teach. . . . [D]efendants are hereby restrained from suspending plaintiff. *Thompson* v. *Southwest School District*, 483 F.Supp. 1170, 1182, 1185 (W.D. Mo. 1980).
>
> * * *
>
> In the present case whatever force the MSPB's presumption commanded was dispelled by Gloster's contention, and the GSA's confirmation, that her conviction bore no relation to her job performance, and was not so notorious so as to discredit the agency or otherwise affect the performance of others. . . . [W]e reverse the decision of the Board and remand the case with directions to order reinstatement and back pay. *Gloster, supra*, 720 F.2d at 704, 705.

In a case on "all fours," *Golden* v. *Board of Education*, W.Va., 285 S.E.2d 665 (1982), a statute authorized teacher discipline for undefined "immorality." The Court stated the well-established rule of construction requiring nexus.

> When confronted with this problem courts seek to determine if a "rational nexus" exists between the conduct complained of and the duties to be performed. *Golden, supra*, 285 S.E.2d at 668.

In *Golden*, the "off-duty" conduct was shoplifting. The only evidence submitted to the Board to support the charge of "immorality" consisted of the arrest and plea records, as in the present case.

> In the case now before this Court, the only evidence submitted to the Board to support the charge of immorality were the records of the magistrate indicating

> the arrest on the aforestated charge and Mrs. Golden's plea of nolo contendere thereto. The Board apparently adopted the view that conviction on the misdemeanor charge was *per se* immoral conduct within the meaning of the statute. *Golden, supra,* 285 S.E.2d at 669.

In *Golden,* as in the present case, the only evidence in the record relating to the teacher's fitness to teach was favorable to the teacher.

> The only evidence in the record before the Board relating to fitness to teach was the favorable testimony of Mrs. Golden's fellow teachers and of the principal and assistant principal at her high school. *Golden, supra,* 285 S.E.2d at 669.

In *Golden,* the court reversed and remanded "with instructions to direct the board of education to reinstate Arlene Golden." *Id.,* p. 669. The court held that the required nexus had not been shown:

> From this evidence, the Court concludes that the Board was presented with no evidence from which it could conclude that the petitioner was unfit to teach. Indeed, the evidence indicates that it should have concluded the opposite. *Golden, supra,* 285 S.E.2d at 669.

The court stated the due process reason for requiring the nexus to be shown:

> One reason for requiring a showing that the alleged immoral conduct has a resulting impact upon the teacher's fitness to teach or upon the school community is that to examine only the conduct itself would result in a statute that would be void for vagueness under substantive due process constitutional standards. *Golden, supra,* 282 S.E.2d at 669.

In the present case, as in *Golden,* the required nexus between the "off-duty" misconduct and the teacher's fitness to teach was never shown. In fact, all the evidence presented *favorably* demonstrated her fitness to teach.

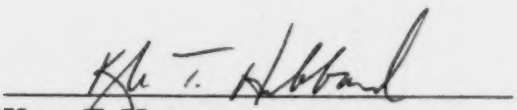
All of the above cases demonstrate the well-established due process requirements of nexus and substantial evidence to prove nexus between off-duty conduct (including criminal conduct) and job performance, before a person's career and livelihood can be taken away.

Nevertheless, in the present case, neither the Board nor the Kentucky Courts followed these well-established due process requirements, to effect the revocation of petitioner's teaching certificate.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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